**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **SHARON P. YARBROUGH** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 205,646 |
| **THE BOEING COMPANY** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **KEMPER INSURANCE** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier appeal from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on March 30, 2000. The Appeals Board heard oral argument August 18, 2000.

## APPEARANCES

Stephen J. Jones of Wichita, Kansas, appeared on behalf of claimant. Vincent A. Burnett of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

## RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

## ISSUES

The ALJ awarded benefits for a 48.5 percent work disability based on a 64 percent wage loss and a 33 percent task loss. The two issues on appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of her employment? Respondent argues that the Board should rely on the opinion of the Court-appointed independent medical examiner who concluded claimant's injury was not from her work for respondent. Claimant argues this opinion fails to consider the recent nerve conduction test and

relies on an inadmissible opinion of Dr. Kenneth D. Zimmerman who was not deposed in this case.

2. What is the nature and extent of claimant's disability? Respondent argues that even if the case is compensable, the award should be limited to functional impairment based on Dr. Philip R. Mills' opinion that no restrictions are required. Claimant, on the other hand, argues that the wage loss should be higher than found by the ALJ.

Respondent initially asked that a different insurance carrier be named. At oral argument, respondent advised this issue has been resolved by agreement and need not be addressed by the Board.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. Claimant is awarded benefits based on a 47.5 percent work disability.

### Findings of Fact

1. Claimant worked for respondent making wire harnesses and building radar control test panels.

2. In August 1995, claimant's elbows began hurting. She was seen by Dr. Zimmerman at Boeing Central Medical, who considered her problems to be nonoccupational. Dr. Zimmerman referred claimant to Dr. Perlita Odulio. Dr. Odulio first saw claimant August 30, 1995, for complaints of numbness in both hands. Dr. Odulio ordered a nerve conduction study and, based on the results, concluded claimant had an ulnar nerve neuropathy in both elbows. Dr. Odulio recommended bilateral elbow protectors.

Dr. Odulio saw claimant again January 9, 1996. Dr. Odulio ordered physical therapy and continued to see claimant monthly through October 16, 1996. At that time, Dr. Odulio ordered a second nerve conduction study. The results were consistent with the earlier study, again showing ulnar neuropathy bilaterally.

Dr. Odulio had ordered a functional capacity evaluation (FCE). Based on the FCE, Dr. Odulio recommended claimant be limited to lifting 20 pounds occasionally, 10 pounds frequently, and 4 pounds constantly. Lifting from floor to 67 inches was to be limited to 10 pounds occasionally, 5 pounds frequently, and 2 pounds constantly. Claimant could carry 25 pounds occasionally, 13 pounds frequently, and 5 pounds constantly. She could push or pull 21 pounds occasionally, 10 pounds frequently, and 4 pounds constantly.

Dr. Odulio rated claimant's total impairment as 12 percent of the whole person and opined that this impairment was work related.

3. Dr. Mills examined claimant on July 20, 1998. He reviewed records of other physicians who had seen claimant. At the time Dr. Mills saw claimant, the complaints were pain in neck, upper back, shoulder girdle region, elbows, and hands with numbness and tingling in the fingers bilaterally. Dr. Mills diagnosed fibromyalgia with chronic pain syndrome, degenerative arthritis, and underlying depression. Dr. Mills did not believe these conditions resulted from claimant's work. He did give a 5 percent impairment rating for subjective pain. He did not believe work restrictions were necessary.

When questioned about his diagnosis of degenerative arthritis, Dr. Mills acknowledges that he did not take x-rays and that x-ray reports from other physicians noted no definite arthritic changes. Dr. Mills testified he relied, for this diagnosis, upon the report from Dr. Zimmerman. Dr. Mills did not know whether Dr. Zimmerman had taken x-rays.

Dr. Mills disagreed with the diagnosis of Dr. Odulio. Dr. Mills testified he did not consider Dr. Odulio's nerve conduction studies to be reliable, apparently based on past experience he had with Dr. Odulio. Dr. Mills did not order any nerve conduction study. He thought it unnecessary because the numbness was diffuse, it did not follow the ulnar or other nerve distribution. Dr. Mills was not aware of the second nerve conduction study done by Dr. Odulio.

4. At the request of her attorney, claimant was examined and her injury evaluated by Dr. Pedro A. Murati. Dr. Murati saw claimant February 19, 1998. He diagnosed bilateral carpal tunnel syndrome, bilateral ulnar cubital syndrome, and a cervical strain. He gave separate ratings for each upper extremity and for the cervical strain and combined these for a 24 percent whole person impairment.

He recommended that for lift, carry, push, and pull activities, she limit the weight to 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly. He recommended she avoid awkward positions of the neck, that she use wrist splints while working at home, that she use no vibratory tools, and that she use no hooks or knives.

Dr. Murati reviewed the task list prepared by Mr. Jerry D. Hardin and agreed with Mr. Hardin's determination that claimant cannot do a total of 18 of 42 total tasks claimant had done in her work during the 15 years before her accident. The Board notes that 10 of these tasks are duplications. They are the same tasks done for the same employer, Boeing, during a different time period. The Board therefore considers the total task list to be a list of 32 different tasks. Of the 32, claimant cannot perform 10 under Dr. Murati's restrictions.

The restrictions recommended by Dr. Murati were the same general lifting restrictions as recommended by Dr. Odulio based on the FCE. Dr. Odulio did add more specific and more limiting restrictions for certain types of lifting and pushing/pulling activities.

5. Claimant was laid off effective August 7, 1998. The layoff was a medical layoff based on respondent's conclusion it could not accommodate claimant's restrictions.

6. Ms. Karen C. Terrill and Mr. Hardin, both vocational experts, testified that claimant retains the ability to earn wages. Mr. Hardin testified she could earn $320 per week, and Ms. Terrill testified claimant could earn from $6.64 to $7.05 per hour, or from $265.60 to $282 per week, for a 40-hour week with an additional 10.4 percent in fringe benefits. The ALJ found from this evidence that claimant has the ability to earn $320 per week and the Board affirms that finding.

7. The Board finds claimant has not made a good faith effort to find employment. Claimant went to some initial workshops with Terrill and Associates as part of a job placement program but did not return, citing extreme discomfort. Claimant has made no other efforts to find work.

## Conclusions of Law

After reviewing the record and considering the arguments, the Appeals Board concludes the ALJ's decision to award work disability should be affirmed. The extent of that work disability should be modified because the task loss opinions considered duplicate tasks.

1. Claimant has the burden of proving her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board concludes that in this case claimant has proven a work disability. The evidence establishes she can no longer do the job she was doing and that she is not earning a wage that is 90 percent or more of her preinjury wage. K.S.A. 44-510e.

3. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

4. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. The Board finds claimant has not made a good faith effort to find employment and consequently a wage should be imputed. The Board has found, based on testimony of Mr. Hardin, that claimant can earn $320 per week. Compared to the preinjury wage of $888.93, claimant has a 64 percent wage loss.

6. The Board finds, based on the opinion of Dr. Murati, that claimant has a 31 percent task loss. The Board has not relied on Dr. Mills' opinion. He rejected without full explanation the first nerve conduction study, stating only that he would not consider Dr. Odulio's study. Dr. Mills testified only to the first study. He did not make mention of the second study. Dr. Mills relied on the opinion of Dr. Zimmerman that claimant has arthritis without information about the basis of Dr. Zimmerman's opinion. The Board finds Dr. Odulio's opinion, based on two nerve conduction studies, to be convincing.

While Dr. Murati is the physician chosen by claimant, Dr. Murati's restrictions appear consistent with the FCE and the opinions of Dr. Odulio. The Board therefore adopts Dr. Murati's opinion. But Dr. Murati relied on a task list from Mr. Hardin that duplicated ten tasks. These were the same ten tasks done for the same employer only at a different time. The Board therefore finds claimant has a 31 percent task loss.[1]

7. The Board finds claimant has a 47.5 percent work disability based on a 31 percent task loss and a 64 percent wage loss.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes on March 30, 2000, should be, and the same is hereby, modified.

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[1] The ALJ found a 33 percent task loss but does not explain how she arrived at this conclusion other than to say she relied on the opinion of Dr. Murati. Dr. Murati's opinion, without eliminating the duplicated tasks, would be a 43 percent loss. When the duplication is eliminated, the loss becomes 31 percent.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Sharon P. Yarbrough, and against the respondent, The Boeing Company, and its insurance carrier, Kemper Insurance Company, for an accidental injury which occurred July 21, 1998, and based upon an average weekly wage of $888.93, for 197.13 weeks at the rate of $366 per week or $72,149.58 for a 47.5% permanent partial disability.

As of August 31, 2000, there is due and owing claimant 110.29 weeks of permanent partial disability compensation at the rate of $366 per week in the sum of $40,366.14 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $ 31,783.44 is to be paid for 86.84 weeks at the rate of $366 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
Vincent A. Burnett, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director